Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	CS Docket No. 95-61

To: The Commission

REPLY COMMENTS OF VALUEVISION INTERNATIONAL, INC.

ValueVision International, Inc. ("ValueVision") respectfully submits these reply comments in the above-referenced proceeding.

The purpose of the Commission's report to Congress in this proceeding is "to monitor and summarize the status of competition in the marketplace for video programming." Notice ¶ 5. As the Notice recognizes, "Congress expected the Commission to address and resolve problems regarding 'unreasonable cable industry practices, including restricting the availability of programming. . . .'" Notice ¶ 96. Commenters are asked to "recommend rules or policies, in any, that should be adopted, amended or eliminated . . . to foster competition in the market for video program delivery," and to explain "how their proposals would increase competition in the provision of video programming to consumers." Id.

None of the commenters in this proceeding has referred to one very important proposed change involving the Commission's commercial leased access rules that can effectively "address and resolve" many of these problems. To implement the congressional mandate on leased access, the Commission should act on petitions for reconsideration of its initial rules that have now been pending for over two years.

Last year's notice included the following question: "Has leased access provided a carriage outlet for programming services unable to secure carriage on an MSO's system?" 9 FCC Rcd 2896, 2906 (1994).[1] Unlike last year's notice, this year's ignores the Commission's leased access rules as a promising avenue for increasing such "competition in the provision of video programming to consumers." Notice ¶ 96.[2] As ValueVision noted in its comments last year,[3] the "implicit fee" provisions of the Commission's initial leased access rules -- proposed by TCI in its comments and adopted by the Commission in May 1993 -- have been relied upon by larger cable operators effectively to

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[1] No MSO ever responded to this question last year. As ValueVision demonstrated in its comments, the clear answer was (and is) that there is less leased access programming under the Commission's new "implicit fee" rules than there was before the 1992 Cable Act. Although soliciting comments on the state of leased access last year, the Commission never adverted to the subject in its report to Congress. 9 FCC Rcd 7442 (1994).

[2] Cf. Notice at 3 n.9 (citing other provisions of the 1992 Cable Act designed to promote access to vertically integrated cable operators).

[3] A copy of these comments is attached hereto.

eliminate leased access as the kind of tool Congress contemplated to promote such competition.

The Commission has noted that there is no need for commenters to repeat in this proceeding the points already made in others. Notice ¶ 7. ValueVision therefore refers the Commission to its pending June 1993 petition for reconsideration and subsequent filings in MM Docket No. 92-266, demonstrating that the implicit fee provisions have actually led to rate increases for leased access of 600% to 1100% compared to what MSOs were charging prior to those rules. As a result of these exorbitant rates, ValueVision has been denied access to millions of cable homes. And it has actually been <u>forced off</u> approximately 900,000 TCI cable homes, which receive instead the competing programs of TCI affiliates QVC and HSN -- more recently including "Q2," yet another QVC channel. This was the very result that Congress sought to prevent in the leased access amendments of the 1992 Cable Act.

The results to consumers in terms of diminished offerings (and higher priced merchandise) are precisely what can be expected in a monopoly environment. How can the Commission address this obvious competitive problem? By acting promptly on petitions for reconsideration filed by ValueVision and others over two years ago, and adopting changes to the rules as proposed by ValueVision therein (or at the very least establishing leased access rates on an interim basis that do not exceed those agreed upon by cable operators prior to the initial May 1993 rules).

ValueVision believes that the Commission should be in a position to advise Congress in this year's report that it has fostered competition in the video programming market by fully implementing the mandate of the 1992 Cable Act with respect to maximum rates for leased access.

Respectfully submitted,

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	CS Docket 94-48

To: The Commission

REPLY COMMENTS OF VALUEVISION INTERNATIONAL, INC.

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Summary

In connection with its statutory obligation to report annually to Congress on the "status of competition in the market for the delivery of video programming," the Commission has issued a Notice of Inquiry ("NOI"), requesting comments that consider "whether the anticompetitive conduct, as identified in the 1990 Report and in the legislative history to the 1992 Cable Act, has abated." NOI ¶ 73. The Commission has also asked for specific comments on, among other things, whether "leased access [has] provided a carriage outlet for programming services unable to secure carriage on an MSO's system?" Id. at ¶ 63(a).

Rather than addressing these issues, the comments filed by NCTA and leading MSOs contain mostly abstract statements regarding the supposed virtues of vertical integration and not a single word regarding leased access. Such statements ignore the contrary findings of Congress and, most recently, the Supreme Court. Notwithstanding the intent of Congress in enacting the Cable Act, unaffiliated programmers like ValueVision -- the principal competitor to QVC and HSN -- have found it increasingly difficult to obtain commercial leased access.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	CS Docket 94-48

To: The Commission

REPLY COMMENTS OF VALUEVISION INTERNATIONAL, INC.

These reply comments are submitted on behalf of ValueVision International, Inc. ("ValueVision") in response to the Notice of Inquiry ("NOI"), FCC 94-119, released May 19, 1994, in the above-captioned proceeding.

Introduction

ValueVision is a television home shopping network which began operation in October 1991.[1/] It is the principal competitor to QVC and HSN, the other existing home shopping programmers which both dominate the industry and are

[1/] For a more extensive discussion of ValueVision's service, see Reply Comments of ValueVision International, Inc., MM Docket No. 93-8, filed April 27, 1993.

significantly owned by the MSOs.[2] ValueVision's substantial difficulties in obtaining access to those cable systems with significant ownership interests in QVC and HSN make it well situated to comment on "the status of competition in the market for the delivery of video programming." NOI ¶ 1, quoting 47 U.S.C. § 548(g).

QVC and HSN are, to a considerable degree, commonly owned. Seventy percent of the voting stock (and forty percent of the equity) in HSN is controlled by Liberty Media, Inc. ("Liberty"), a TCI spinoff now in the process of being reabsorbed by TCI.[3] TCI, which recently announced a new affiliation agreement with HSN,[4] currently controls cable systems servicing over 10.2 million subscribers.[5] Liberty also currently owns 19

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[2] QVC had $1.22 billion net revenues last year and currently serves 46.5 million full time equivalent ("FTE") homes. QVC, SEC Filing 10-K, April 20, 1994, at 5. It recently introduced Q-2, a new home shopping network to which affiliated MSOs are required to commit for ten years. See John M. Higgins & Richard Katz, Money Talks: Cash Offer Gets Startup Q2 Carriage, Multichannel News, April 11, 1994, at 3. HSN had $1.05 billion in net annual sales and serves 34 million homes. Home Shopping Network, Inc. 1993 Annual Report at 37. In contrast, ValueVision had only $37 million in annual sales and serves 5.5 million FTE homes.

[3] United States v. Tele-Communications, Inc., Proposed Final Judgment and Competitive Impact Statement, 59 Fed. Reg. 24723, 24725 (May 12, 1994); Geraldine Fabrikant, Comcast Gets a Lift in QVC Bid, N.Y. Times, July 22, 1994, at D1.

[4] 14 Communications Daily, May 20, 1994, at 6.

[5] 59 Fed. Reg. at 24725.

percent of QVC,[6] which recently introduced its Q-2 home shopping network -- to which affiliated MSOs are required to commit for a period of ten years.[7] Comcast, soon to become the nation's third largest cable operator,[8] currently owns 15 percent of QVC.[9] Other major MSOs with equity interests in QVC include Cox Enterprises and Viacom Cable.[10]

Having sought to obtain, within the last sixteen months, leased access from a wide variety of the leading MSOs, ValueVision has a wealth of experience with which to provide "specific information or examples" in response to the Commission's following question: "Has leased access provided a carriage outlet for programming services unable to secure carriage on an MSO's system?" NOI at ¶ 62(a).

6/ SEC Schedule SC 13D/A with respect to QVC Network Inc., filed by Liberty Media Corp. on July 22, 1994; Fabrikant, id. at D1.

7/ See Higgins & Katz, supra note 2, at 3.

8/ Comcast will become the third largest MSO after its recent agreement to acquire the cable systems of MacLean Hunter. Following this acquisition, Comcast will control cable systems serving more than 3.5 million subscribers. Clustering Is Key; Comcast's $1.27 Billion Bid is Tops for MacLean Hunter Systems, Communications Daily, June 21, 1994, at 1.

9/ Under the latest proposal, Comcast would own 57.5 percent of QVC and Liberty would own 42.5 percent. See Fabrikant at id.; SEC Schedule SC 13D/A with respect to QVC Network Inc., filed by Liberty Media Corp. on July 22, 1994.

10/ Id. at 12.

I. THE COMMENTS FILED BY NCTA AND THE CABLE OPERATORS FAIL TO ADDRESS THE COMPETITIVE ISSUES ABOUT WHICH THE COMMISSION HAS REQUESTED INFORMATION

The NOI requests information on "whether the anticompetitive conduct, as identified in the [Commission's 1990 Cable Report to Congress] and in the legislative history to the 1992 Cable Act, has abated," and asks that such comments be supported by "specific information [and] examples." NOI ¶ 73. Instead of providing any such examples, commenters such as NCTA devote most of their energy to denying the obvious competitive problems with bottleneck monopolies -- problems recognized by Congress in the 1992 Cable Act[11/] and by the Supreme Court in the recent "must carry" case.[12/] And these commenters decline

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11/ See Cable Act at § 2(a)(5).

12/ See Turner Broadcasting System, Inc. v. FCC, No. 93-44 (U.S. June 27, 1994), slip op. at 32:

> When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with the mere flick of the switch.

(footnote omitted.) See also id. at 3 (Stevens, J., concurring) ("It is also clear that cable operators--particularly (but not exclusively) those affiliated with cable programmers--have both the ability and the economic incentive to exploit their gatekeeper status . . . .").

entirely to address the serious problems of access under the Commission's commercial leased access rules.

One MSO seems to suggest that the competitive problems in the cable industry that Congress and the Commission have sought to address would somehow all go away if only the Commission would define the market more broadly. See TWC Comments at 16-24.[13/] And NCTA, et al., argue, in effect, that, with respect to issues of vertical integration, there was no need for the Cable Act in the first place. See NCTA Comments at 22 (quoting B. Klein, The Competitive Consequences of Vertical Integration in the Cable Industry, June 1989, at 3 (pre-Cable Act study which found "'no evidence that vertically integrated MSOs systematically exclude programming networks in which they do not have ownership interests'").

Both Congress and the Commission have since concluded, however, precisely the opposite. As the Commission noted, MSOs have reduced incentives to provide access "when a particular program supplier's offering provides programming . . . [that] competes with a program service already being provided by that

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[13/] The comments of another MSO include as an attachment an economic study that addresses the supposed theoretical benefits of vertical integration. See Charles River Associates, Inc., An Economic Analysis of the FCC's Proposed Cable Ownership Restrictions (Feb. 9, 1993) at 23, 28 ("vertical integration between MSOs and cable program services can lower costs"; "an MSO that owns a program service will not always have the ability to disadvantage rival program services") (emphasis added) (attached to comments of TCI).

cable system." Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of the Cable Television Service, 5 FCC Rcd 4962, 5047 (1990). And as Congress found: "[Vertically integrated] cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems." 1992 Cable Act, § 2(a)(5).[14/]

In any event, the Commission has not asked for a general dissertation on whether the Cable Act was a good idea. Instead, it has asked for evidence regarding the actual competitive effects of vertical integration by cable operators and, in particular, the effects of commercial leased access on

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[14/] NCTA cites a number of cases in which unaffiliated cable programmers were allegedly able to obtain carriage on vertically integrated MSOs. NCTA Comments at 23. But NCTA avoids the crucial question of the extent to which there is direct competition between the programming offered by the unaffiliated cable network and that offered by the vertically integrated MSO.

The fact is that where the programming of unaffiliated cable networks is in competition with programming offered by vertically integrated MSOs, such MSOs have typically attempted to block carriage access. In 1990, for example, the FCC drew attention to TCI's carriage contracts with CNBC, which prohibited CNBC from developing a general news channel that would compete with CNN, of which TCI is a part owner. FCC Focuses on "Fine-Tuning" Cable Regulation, Communications Daily, March 16, 1990, at 1. Similarly, the antitrust complaint filed by Viacom against TCI contains allegations that TCI frequently refuses to carry programming that competes with its own affiliated programming services. Complaint at ¶ 39(2), Viacom Int'l Inc. v. Tele-Communications, Inc., No. 93 Civ. 665 (S.D.N.Y., filed September 23, 1993).

access to cable. The MSO comments lack any substantive discussion of such competitive effects and even a single word on the subject of leased access. As discussed below, this silence speaks volumes.

II. UNDER THE COMMISSION'S IMPLICIT FEE MODEL FOR LEASED ACCESS, UNAFFILIATED PROGRAMMERS SUCH AS VALUEVISION HAVE BEEN EFFECTIVELY DENIED THE OPPORTUNITY TO OBTAIN A CARRIAGE OUTLET

As noted above, the Commission has asked for comments regarding the following question: "Has leased access provided a carriage outlet for programming services unable to secure carriage on an MSO's system?" NOI at ¶ 62(a). As described in more detail in ValueVision's November 1993 Supplement to Petition for Reconsideration,[15/] ValueVision wrote to the largest 99 MSOs in April and May 1993 asking for their commercial leased access rates and requesting the opportunity to be considered for leased access carriage. Close to seventy MSOs failed to respond at all.[16/] Of those that did respond, the general message was that retransmission consent and rate regulation issues would occupy all of their time until the Fall. In light of the value it places on productive relationships within the cable industry, ValueVision agreed to defer further inquiries in this area until

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[15/] A copy of that Supplement is attached hereto as Exhibit A.

[16/] Cf. 47 C.F.R. § 76.970(e) ("[u]pon request, [cable operators shall provide] a schedule of commercial leased access rates . . . to prospective leased access programmers").

those issues had been resolved. ValueVision thus employed other approaches to distribution throughout the Summer and early Fall of 1993.[17]

ValueVision sent out a second round of certified mailings in November 1993. Once again, there were only a limited number of responses, and none of these generated any carriage opportunities for ValueVision.

In May 1994, after the Commission's new rate regulation rules were published, ValueVision wrote again, this time to approximately 58 MSOs with which it either had not been doing business or which had been unresponsive to its inquiries. ValueVision has received several kinds of responses to this inquiry concerning commercial leased access. Twenty five MSOs have failed to respond in any manner to any of ValueVision's mailings. A second group has responded by basically refusing to supply the requested information.

Several MSOs have actually taken refuge in the FCC's rulemaking proceedings by suggesting that any leased access rate negotiation should be "defer[red]" while the FCC's commercial leased access rules are under review. <u>See</u> Exhibit B. This

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[17] Other MSOs responded by asking for burdensome additional information, demanding a non-refundable deposit before they would provide such rates, or stating that they had neither the time nor the inclination to comply with ValueVision's request. In a handful of cases, the MSOs did supply rates, but, as noted in ValueVision's previously submitted Supplement, these proved to be exorbitant.

stratagem has been coupled with recent attempts to delay those proceedings even further by seeking yet a further round of comments on issues that have already been addressed for over a year.[18/] Others have claimed to ValueVision -- usually without further explanation -- that information regarding the television systems they operate could be obtained "from any cable television fact book," see Exhibit C; and that no rates would be supplied until ValueVision has provided "information on the products [it] sell[s] . . . [and] a copy of [its] annual report and financial statements," see Exhibit D. The epitome of this strategy was the following: "[W]e don't know if by 'system' you mean a cable system as defined by the Cable Act and FCC Rules and Regulations, or if you are more interested in certain markets." See Exhibit E. Other MSOs, which had earlier failed to respond to mailings from ValueVision, later stated that they are already "fulfilling [the] leased access requirements" with other programmers, see Exhibit F, or have already "committed all of our Leased Access capacity to other programmers," see Exhibit G. In the interim, major MSOs have signed on to long term affiliation agreements for yet a second QVC channel, Q2.[19/]

[18/] See Ex Parte Comments of Continental Cablevision, Inc., MM Docket No. 92-266 (July 11, 1994).

[19/] See supra note 7 and accompanying text.

A final group of MSOs (about twenty) have, as requested, responded with rates.[20] But the majority have offered rates so exorbitant that ValueVision could never expect to be able to afford access. These rates, when extrapolated to full-time equivalence, have extended as high as $.82 per subscriber per month (or $9.84 per subscriber per year) -- rates that are as much as 1200 percent higher than those negotiated by ValueVision prior to the promulgation of the new rules. In several cases, these rates have amounted to fees of more than $1.8 million annually (TCI New Jersey and TCI Oakland) and $2.1 million (Dimension Cable Phoenix).

Nor has ValueVision been alone in having such experiences. Telemiami is an unaffiliated Spanish and Portuguese language cable programmer which had its leased access rates raised by TCI to more than seven and half times what it was paying prior to the promulgation of the Commission's leased access rules. United Broadcasting Corp. d/b/a Telemiami, CSC-366, DA 94-623, released June 13, 1994.[21] In granting a

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[20] Many of these have failed to supply information regarding the number of their subscribers, without which it is, of course, impossible to evaluate the reasonableness of the rate. For purposes of these reply comments, we have used the subscriber information contained in the 1994 Television & Cable Fact Book.

[21] Telemiami had entered into a five year agreement with TCI in 1988, under which it agreed to pay TCI $3,500 per month for leased access. In February 1994, after promulgation of the Commission's rules, TCI announced that it would no longer carry Telemiami's programming unless Telemiami agreed to pay TCI's new leased access rate of $26,341 per month -- seven and a half times (continued...)

temporary emergency stay of the leased access rules, and permitting Telemiami to continue paying its former rate pending resolution of the underlying complaint, the Commission emphasized the relevant statutory purpose of the Cable Act (namely, to promote competition in the delivery of video programming). It should be noted that ValueVision and Telemiami are among the very few cable programmers that have even been in a position to seek access under the leased access provisions of the Act.

Given such experiences, an important question must be asked by the Commission: How many cable programmers have been able to obtain leased access since passage of the 1992 Act? Congress was clearly concerned about the possibility that unaffiliated programmers would have difficulty obtaining leased access. Congress determined to impose rate regulation for commercial leased access as a partial solution to this problem, and it required that regulation to be implemented by May 1993. The Commission has recognized, however, that its May 1993 leased access rules are only a "starting point that will need refinement," rather than rules that "comprehensively resolve all the issues potentially involved." 8 FCC Rcd 5631, 5936 (1993). Yet these rules remain in place some fifteen months later, with disturbing effects. Unless the Commission undertakes needed modifications to those rules, it will have no choice but to

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[21/](...continued)
higher than the old rate and more than 60 percent higher than Telemiami's entire monthly revenues.

report to Congress that commercial leased access is actually in worse shape than it was prior to the 1992 Cable Act.

Respectfully submitted,

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Dated: July 29, 1994

CERTIFICATE OF SERVICE

I, William R. Richardson, Jr., hereby certify that on this 28th day of July, 1995, I caused be delivered by first-class mail, postage prepaid (and by hand where indicated), copies of the foregoing "Reply Comments of ValueVision International, Inc.," to the following:

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